

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

GILBERT C. FOUST and
LORETTA E. FOUST,

Debtors.

CASE NUMBER 00-41134

MICHAEL D. BUZULENCIA, TRUSTEE,
Plaintiff,

vs.

GILBERT C. FOUST, et al.,
Defendants.

ADVERSARY NUMBER 00-4148

M E M O R A N D U M O P I N I O N

This cause is before the Court on the motion for summary judgment (the "Motion") filed by Defendants Approved Residential Mortgage, Inc. and its nominee, MERS a/k/a Mortgage Electronic Registration Systems, Inc. ("Defendants"). Plaintiff/Trustee Michael D. Buzulencia ("Trustee") filed a memorandum in opposition to Defendants' Motion. This Court has jurisdiction over this matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

S T A N D A R D O F R E V I E W

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that

[t]he judgment sought shall be rendered forth-with if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the

initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

F A C T S

It is undisputed that on July 14, 1998, Debtors Gilbert C. Foust and Loretta E. Foust ("Debtors") executed a mortgage to Approved Federal Savings Bank on real property located at 297 Holden Court, Geneva, Ohio 44041, in the principal amount of One Hundred Five Thousand Dollars (\$105,000.00) (the "Mortgage").

The Mortgage was duly recorded in the Ashtabula County Recorder's Office.

However, Defendants and Trustee disagree as to the number of individuals who witnessed execution of the Mortgage. Defendants attached to the Motion an affidavit of Dennis Hurte, the closing agent for the Mortgage execution. Mr. Hurte's affidavit states that he notarized the execution of the Mortgage, signed the Mortgage as a witness, and witnessed Jessica Sutphen sign the Mortgage as a witness. Under the law of Ohio, a notary can both notarize the mortgage's acknowledgment and sign the attestation as one of the two witnesses to the signature. *Wayne Bldg. & Loan Co. v. Hoover*, 231 N.E.2d 873, 875 (1967) (citing *Read v. Toledo Loan Co.*, 67 N.E. 729 (1903)). In contrast, Trustee filed an affidavit of Debtors in which Debtors attest that only one individual witnessed the Mortgage and no individual claimed to be a notary.

D I S C U S S I O N

Summary judgment is improper if there is a genuine issue of material fact. A dispute regarding how many individuals witnessed execution of the Mortgage is a genuine issue of material fact. There are three major prerequisites in Ohio for the proper execution of a mortgage: (1) the mortgagor must sign the mortgage deed; (2) the mortgagor's signature must be attested by two witnesses; and (3) the mortgagor's signature must be

acknowledged or certified by a notary public (or other designated official).¹ OHIO REV. CODE ANN. § 5301.01(A) (Anderson 1998); see *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1024 (6th Cir. 2001). A mortgage that fails to meet all three prerequisites is defectively executed. A defectively executed mortgage, even though recorded, does not place a bona fide purchaser on constructive notice of the encumbrance. *Citizens Nat'l Bank v. Denison*, 133 N.E.2d 329, 333 (1956); *Amick v. Woodworth*, 50 N.E. 437 (1898); *Thames v. Asia's Janitorial Serv., Inc.*, 611 N.E.2d 948 (1992). Since a defectively executed mortgage does not place a bona fide purchaser on constructive notice of the encumbrance, bankruptcy trustees are permitted to avoid improperly executed mortgages pursuant to § 544(a)(3). See *In re Zaptocky*, 250 F.3d 1020; *In re Land*, 289 B.R. 71; *In re Haviaras*, 266 B.R. 792. Therefore, the number of witnesses who attest to the mortgagor's signature impacts whether a trustee can

¹There have been multiple changes to Ohio's mortgage law in recent years that affect the circumstances under which a bankruptcy trustee qualifies as a bona fide purchaser and can avoid a defectively executed mortgage under § 544(a)(3). Case law has established that the version of Ohio Revised Code § 5301.01 in effect when a debtor's petition for relief is filed controls the law governing whether the trustee can avoid a defective mortgage under § 544(a)(3) because that is when a trustee's right as a bona fide purchaser vests. See *Kovacs v. First Union Home Equity Bank (In re Huffman)*, 369 F.3d 972, 977 (6th Cir. 2004) (citing *Buzulencia v. TMS Mortgage, Inc. (In re Baker)*, 300 B.R. 298, 307 (Bankr. N.D. Ohio 2003)); *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1028 n.5 (6th Cir. 2001); *Davis v. Ocwen Fed. Savs. Bank (In re Haviaras)*, 266 B.R. 792, 799 (N.D. Ohio 2001). Because Debtors filed their petition for bankruptcy on April 25, 2000, a valid mortgage execution requires two witnesses to attest to a mortgagor's signature. OHIO REV. CODE ANN. § 5301.01 (Anderson 1998).

avoid a mortgage. Because there is a genuine issue of material fact, as set forth in the competing affidavits attesting to the number of individuals who witnessed the Mortgage execution, summary judgment is inappropriate.

C O N C L U S I O N

Defendants' Motion is denied.

An appropriate order shall enter.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

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NORTHERN DISTRICT OF OHIO

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O R D E R

For the reasons set forth in this Court's memorandum
opinion entered this date, the motion for summary judgment filed
by Approved Residential Mortgage and its nominee, MERS a/k/a
Mortgage Electronic Registration Systems, Inc., is hereby denied.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
Memorandum Opinion and Order were placed in the United States

Mail this _____ day of February, 2005, addressed to:

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